Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.A. LOCAL NO. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED PENSION TRUST FUND; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED HEALTH & WELFARE TRUST FUND; and U.A. LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,

Petitioners,

v.

NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC.; ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; and AUDREY JEAN PETTIT,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under federal labor law, may a finding of an alter ego violation be based upon objective evidence without requiring additional proof that the employer's subjective intent is to avoid its obligations under its collective bargaining agreement?

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U.A. Local Union No. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO ("U.A. Local 343"); U.A. Local Nos. 159, 342, 343 and 444 Combined Pension Trust Fund; U.A. Local Nos. 159, 342, 343 and 444 Combined Health &

Welfare Trust Fund; and U.A. Local No. 343 Journeyman and Apprentice Training Trust Fund ("Trust Funds") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this lawsuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 48 F.3d 1465. The opinion of the district court (App. B, *infra*) is reported at 797 F. Supp. 767.

JURISDICTION

The court of appeals denied a petition for rehearing herein on February 23, 1995 (App. C, *infra*) and entered its order and amended opinion on February 28, 1995. On May 11, 1995, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including June 23, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor-Management Relations Act ("LMRA"), as amended, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 515 of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1145 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 502(e)(1) of ERISA, 29 U.S.C. § 1132(e)(1) provides, in relevant part:

> Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary.

Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2) provides:

> In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.
>
> For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate

provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

INTRODUCTION

Within the space of three months, courts of appeals from three circuits have issued conflicting decisions on the issue presented here. The issue involves the elements of proof required under the labor law alter ego doctrine, one of several rules developed by the National Labor Relations Board for determining whether purportedly separate entities are so closely related that they should be treated as a single enterprise.

In *Stardyne, Inc. v. N.L.R.B.*, 41 F.3d 141 (3d Cir. 1994) and *N.L.R.B. v. Hospital San Rafael*, 42 F.3d 45 (1st Cir. 1994), the First and Third Circuits enforced decisions and orders holding that illegal motive need not be shown in order to establish alter ego status under federal labor law. In the instant case, a panel of the Ninth Circuit, in conflict with Ninth Circuit precedent, held that a showing of such intent is required to establish alter ego status. As the Third Circuit noted in *Stardyne, supra*, 41 F.3d at 146-147, n.4, the circuits' conflicts on this issue long predate these three cases.

Stardyne, supra, was remanded to the National Labor Relations Board for clarification of the relationship between its single employer and alter ego doctrines. It is presently pending there. *Hospital San Rafael, supra*, is the subject of a certiorari petition presently before this Court in No. 94-1802.

Petitioners submit that the Board should be allowed to clarify the single employer and alter ego doctrines, and the relationship between them, in accordance with its statutory mandate. See *Stardyne, supra*, 41 F.3d at 147-148. Accordingly, petitioners submit that the petition in No. 94-1802 should be denied as being premature in the process of policy development prescribed by Congress. However, if the Court disagrees with that position and grants the *Hospital San Rafael* petition, then this case

also is worthy of review because it raises exactly the same legal issue as the petition in *Hospital San Rafael.*

In the instant case, the Ninth Circuit vacated a summary judgment and remanded the action for trial, principally on the issue of illegal intent. It would make little sense for that trial to go forward while the question of the intent requirement's propriety were before this Court for plenary review. This Court's review could lead to a change in the law, which could necessitate a second appeal and a retrial in the instant case. To avoid such a result, petitioners submit that if the petition in No. 94-1802 is granted, then the instant petition should be granted as well, or, at a minimum, should be held pending the Court's decision therein.

STATEMENT OF THE CASE

A. Nature of the Case

In labor law parlance, this is a "double-breasted employer" case of the "alter ego" variety. The term "double-breasted" describes a situation in which a union-signatory business, or its owners, also have an interest in another, similar, non-union business. If the two businesses are entirely separate, if no common owner exercises control over more than one of the businesses, and if the two businesses deal with each other purely at arm's length, then the double-breasted relationship is lawful and may remain intact.

But where the separateness of the businesses is not scrupulously maintained, either they may be found to be a "single employer" or the non-union business may be found to be the "alter ego" of the union business. In either event, they will be held by a court to have violated the union recognition and work coverage clauses of the labor agreement, *inter alia*, or by the NLRB to have violated their duty to bargain with the union. The same legal standards are applied by the courts and the Board, even though the former adjudicate under Section 301 of the

LMRA and Section 515 of ERISA, while the latter decides unfair labor practices under Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1). *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 509-513 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983).

The standard for determining "single employer" status is well established. As the Ninth Circuit explained below (App. A, *infra*, 4a-7a) and in *N.L.R.B. v. Don Burgess Construction Corporation*, 596 F.2d 378, 384 (9th Cir. 1979), *cert. denied*, 444 U.S. 940 (1979):

> It is settled that the Board may treat two or more distinct business entities as a "single employer" for purposes of the Act. In such cases, the criteria to which the Board looks in order to determine single employer status are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. [Citations omitted.] The Board has stressed the first three of these factors, as well as the presence of control of labor relations. [Citations omitted.] However, no one of the factors is controlling, *N.L.R.B. v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir. 1971), nor need all criteria be present. Single employer status ultimately depends on "all the circumstances of the case" and is characterized as an absence of an "arm's length relationship found among unintegrated companies." [Citations omitted.]

Where, as here, the non-union business is alleged to be the "alter ego" of the union signatory, the same criteria are applied initially. App. A, *infra*, 5a-9a, *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 518-519 (9th Cir. 1989). After making the initial single employer finding, the NLRB or the court goes on to determine whether the non-union business is, in reality, either the disguised continuance of a former union signatory or an attempt to avoid the union signatory's collective bargaining obligations through a sham

transaction or a technical change in operations. *Haley & Haley, Inc. v. N.L.R.B.*, 880 F.2d 1147, 1149-1150 (9th Cir. 1989) and cases cited,[1] *A. Dariano & Sons, supra*, 869 F.2d at 518. The Ninth Circuit treats this standard as equivalent to the NLRB's formulation of the alter ego test: "substantially identical management, business purpose, operation, equipment, customers, supervision and ownership." *Haley & Haley, supra*, 880 F.2d at 1150.

The most important difference between the two doctrines lies in their results. When two businesses are found to be a single employer, a question remains whether their employees together constitute an appropriate bargaining unit, and thus whether the double-breasted employer can be held liable under the labor agreement. App. A, *infra*, 4a-5a. In the Ninth Circuit, such a unit determination must be left to the NLRB. *Ibid.*, and cases cited there. *Contra, Pratt-Farnsworth, supra*, 690 F.2d at 513-522.

In an alter ego case like this one, however, the court proceeds directly to enforcement of the collective bargaining agreement. App. A, *infra*, 5a, *A. Dariano & Sons, supra*, 869 F.2d at p. 518. This is because " 'in alter ego cases, the issue is whether the work is effectively still in the [bargaining] unit because the allegedly new employer is the same as the former employer.' " *Haley & Haley, supra*, 880 F.2d at 1149.

The compensatory damages recoverable by trust funds in alter ego cases are the fringe benefit contributions they would have received had the employer applied the labor agreement to its entire business, not just the "union side." Such claims are brought under Section 301 of the LMRA, 29 U.S.C. § 185, and Sections 502 and 515 of ERISA,

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[1]As the court of appeals observed (App. A, *infra*, 10a), the alter ego doctrine is not limited to successor situations. It applies equally to parallel, concurrent operations. In *Haley & Haley, supra*, the two companies were operated concurrently for eighteen months as the business was transferred to the non-union company. The same was done here over a somewhat longer period.

29 U.S.C. §§ 1132 and 1145. These damages are augmented with liquidated damages, interest and attorneys' fees pursuant to the labor agreement and Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2).

B. Summary of the Facts

This case arises from respondents' transfer of the business of Nor-Cal Plumbing, Inc., a long-time union-signatory plumbing contractor owned and managed by Elmar Lee Pettit, to North Bay Plumbing, Inc., a non-union company purportedly owned by his wife, Audrey Jean Pettit. In fact, North Bay always has been owned, controlled and managed by Mr. Pettit. North Bay has continued Nor-Cal's business, but has not honored its labor agreement with U.A. Local 343, a plumbers and pipe fitters union, as to the work it covers.

The clear and unimpeached evidence is that in late 1980, Mr. Pettit established North Bay behind the disguise of Mrs. Pettit's purported ownership. North Bay's purported general manager was John Adams, a Nor-Cal plumbing foreman whom Mr. Pettit recruited for North Bay. From North Bay's earliest days Mr. Pettit hired, supervised, promoted and fired its employees, directed its operations, dealt with its customers, and commingled the two companies' purchasing and use of assets. And while North Bay never issued stock so as to show its ownership, on two occasions in 1983 Mr. Pettit testified that he owned and managed North Bay. He also made numerous sworn statements to the California Contractors State License Board that he owned and managed North Bay.

Nor-Cal and North Bay were integrated parts of one enterprise. Between North Bay's inception in late 1980 and Nor-Cal's demise in early 1987, Mr. Pettit gradually transferred Nor-Cal's major customers and business to North Bay. In January of 1987, Nor-Cal laid off its employees, and its superintendent transferred to North Bay. Thereafter, Nor-Cal went out of business. North Bay has

continued the business from the premises formerly occupied by Nor-Cal.

C. Proceedings Below

This action was brought in May of 1987. The complaint set forth four claims arising from respondents' alter ego scheme: the Union's Section 301 wage and dues claim for breach of the labor agreement, the Trust Funds' Section 301 and ERISA claims for the fringe benefit contributions owed for work performed on the North Bay side of respondents' enterprise, a tort claim for fraud and a claim for punitive damages. The complaint also asserted the personal liability of Mr. and Mrs. Pettit, both by piercing the corporate veils of Nor-Cal and North Bay and under federal common law as participating tortfeasors.

On the first of four defense motions for summary judgment, the district court dismissed Local 343's wage and dues claim, without prejudice, for pursuit under the grievance procedure of the labor agreement. After discovery and the denial of the fourth motion, the district court directed the Trust Funds to move for summary judgment.

The district court granted the motion for summary judgment. As the court of appeals described it:

> On the basis of "an undisputed record of fraud, deception and obstruction," the district court ruled on summary judgment that North Bay was the alter ego of Nor-Cal. Order Granting Summary Judgment at 10 (quoting Order of May 24, 1988). Consequently, the court held that appellants breached the collective bargaining agreement by failing to extend its terms and conditions of employment to North Bay employees. The district court awarded appellees $2.5 million in fringe benefit contributions, liquidated damages, interest, attorneys' fees and costs, and $2 million in punitive damages. Judgment was entered not only against Nor-Cal on the theory that North Bay was its alter ego, but also against the Pettits in

> their individual capacities on the theory that appellants were entitled to pierce the corporate veil.

App. A, *infra*, 2a.

The court of appeals below cited established Ninth Circuit precedent, including *Haley & Haley, supra*, and *A. Dariano & Sons, supra*, in stating the alter ego legal standard. However, the court omitted the "disguised continuance" language from those opinions' statements of the alter ego test. *Id.*, 48 F.3d at 1470, 1472. *Compare N.L.R.B. v. O'Neill*, 965 F.2d 1522, 1529 (9th Cir. 1992), *cert. denied* —— U.S. ——, 113 S.Ct. 2995, *Haley & Haley, supra*, 880 F.2d at 1149-1150. *A. Dariano & Sons, supra*, 869 F.2d at 518. Instead, it held that in order to establish alter ego status, petitioners had to show that North Bay was an attempt to avoid the collective bargaining obligations of Nor-Cal. App. A, *infra*, 5a, 9a. The court characterized this as the "intent" portion of the alter ego showing. App. A, *infra*, 9a, 12a-13a.

The court of appeals agreed with the district court that summary judgment was proper on the single employer portion of the alter ego test. App. A, *infra*, 7a-12a, reviewing App. B, *infra*, 23a-24a. The court of appeals also agreed that petitioners had

> presented significant evidence of Elmar Lee Pettit's anti-union animus and his intent to avoid the collective bargaining agreement with Local 343. Evidence was presented to show that on numerous occasions he declared "I'm gonna close that fucking Union shop!" (S.E.R. [Supplemental Excerpt of Record] Tab 42, at ¶ 6.) Further evidence was presented that he even told a customer that he had to take care to "conceal his involvement with North Bay so that he would not get caught at double breasting." (S.E.R. Tab 13 at ¶ 11.) The appellees also presented evidence that Elmar Lee Pettit used North Bay to do work that would have been performed by Nor-Cal if North Bay had not been created. In fact,

> their evidence showed that several Nor-Cal projects were transferred to North Bay abruptly, in the middle of the job. (*See* S.E.R. Tab 13, at ¶¶ 8-11; Tab 14, at ¶¶ 40-43; Tab 53, at ¶ 3.) Finally, the appellees presented evidence that Nor-Cal stopped bidding on jobs and shut down its operations in 1987. (*See* S.E.R. Tab 29, at ¶¶ 8-12).
>
> * * * *
>
> In sum, appellees have produced substantial evidence that North Bay and Nor-Cal constituted a single employer and that Elmar Lee Pettit's purpose in establishing North Bay was to effect a technical change in operations that would enable him to continue his plumbing business while avoiding his obligations under the collective bargaining agreement with the employees of Nor-Cal.

App. A, *infra*, 9a-10a.

Even though the above-described evidence was undisputed, the court of appeals held that *other* evidence created "a genuine issue of material fact regarding whether Pettit created and operated North Bay with the intention of avoiding Nor-Cal's collective bargaining obligations." App. A, *infra*, at 13a.[2] In reality, what the Ninth Circuit found was not a conflict in the evidence but a conflict as to the conclusion to be drawn from that evidence.

Nevertheless, on the basis of this finding, the court of appeals reversed the grant of summary judgment. The court denied a petition for rehearing and rejected a suggestion for rehearing en banc.

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[2] Earlier, the court of appeals' own opinion had held Mr. Pettit's sworn testimony to be so internally inconsistent that it failed "to create a *genuine* issue of material fact as to whether North Bay was the alter ego of Nor-Cal." App. A, *infra*, 12a. (Italics in original.) Similarly, the district court had found that Mr. Pettit's denials were so self-contradictory that they could not establish a genuine issue of material fact. App. B, *infra*. 26a.

REASONS FOR GRANTING THE PETITION

The NLRB's rule is stated clearly in *Stardyne*: "The Board does not require, however, that an illegal motive be established in order to find alter ego status. [Citations omitted.]" *Johnstown Corp. and/or Stardyne, Inc.*, 313 N.L.R.B. 170, 171 (1993). The First, Second, Third, Fifth, Sixth, Ninth, Tenth and District of Columbia Circuits have agreed that intent is not essential to an alter ego finding, but its presence is a factor to be considered. *N.L.R.B. v. Hospital San Rafael*, 42 F.3d 45, 51 (1st Cir. 1994), *Goodman Piping Products v. N.L.R.B.*, 741 F2d 10, 12 (2d Cir. 1984), *Stardyne, Inc. v. N.L.R.B.*, 41 F.3d 141, 146-152 (3d Cir. 1994), *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 508 (5th Cir. 1982), *cert. denied* 464 U.S. 932 (1983), *N.L.R.B. v. Allcoast Transfer, Inc.*, 780 F.2d 576, 579-582 (6th Cir. 1986), *N.L.R.B. v. O'Neill*, 965 F.2d 1522, 1529 (9th Cir. 1992), *cert denied* —— U.S. ——, 113 S.Ct. 2995, *Haley & Haley, Inc. v. N.L.R.B.*, 880 F.2d 1147, 1150 (9th Cir. 1989), *N.L.R.B. v. Tricor Products, Inc.*, 636 F.2d 266, 270 (10th Cir. 1980), *Fugazy Continental Corp. v. N.L.R.B.*, 725 F.2d 1416, 1419 (D.C. Cir. 1984).

The Seventh and Eighth Circuits, now joined by the court below, hold that a showing of either anti-union animus or intent to avoid collective bargaining obligations is critical to an alter ego finding. *Trustees of Funds of IBEW Local 701 v. Favia Electric Co.*, 995 F.2d 785, 789 (7th Cir. 1993), *Iowa Express Distribution, Inc. v. N.L.R.B.*, 739 F.2d 1305, 1310-1311 (8th Cir. 1984), *cert. denied* 469 U.S. 1088 (1984).

The Fourth Circuit has devised its own standard, which requires a finding that the employer has expected or obtained an economic benefit from the transfer of business from the union signatory to its non-union alter ego. *Alkire v. N.L.R.B.*, 716 F.2d 1014, 1020-1021 (4th Cir. 1983).

Despite this deep division, few courts have examined the question closely. The two which have done so, the Third Circuit in *Stardyne, supra,* and the Sixth Circuit in *Allcoast Transfer, supra,* both have concluded that the NLRB's test is more consistent with the purposes and policies of the National Labor Relations Act. In *Stardyne, supra,* 41 F.3d at 148, the Third Circuit explained:

> We view the Board's resolution of this conflict as consistent with the Act. First, it can be argued that the Board's policy, which relies primarily on an examination of objective criteria, provides for easier and more consistent application of the Act than one in which intent is an essential element. It may be difficult to determine intent when there are facially legitimate business reasons that support a change in corporate form. *See Allcoast*, 780 F.2d at 582. Accordingly, the Board's objective test arguably serves to prevent "industrial strife and unrest," 29 U.S.C. § 151, by restricting the ability of employers to use a pretext in order to avoid their labor obligations. Second, the Board's policy can be defended on the ground that it provides a degree of protection for the legitimate expectations of workers who enter into a collective bargaining agreement with the understanding that it will continue to apply so long as they are working for what they regard as the "same" employer. It can also be argued that the Board's policy furnishes this protection while at the same time generally permitting changes in ownership of employers without saddling the successor with collective bargaining agreements to which they did not agree. *See Burns*, 406 U.S. at 281-82, 92 S.Ct. at 1579. In this way, the Board's rule can be said to promote the Act's goal of encouraging the use of collective bargaining arrangements as a way to balance economic bargaining power. See 29 U.S.C. § 151.

In *Allcoast Transfer, supra,* 780 F.2d at 582, the Sixth Circuit stated:

> Our rejection of the argument that the Board must find an intent to evade union obligations or anti-union animus before imposing alter ego status furthers the purpose of the alter ego doctrine. As we stated earlier, the doctrine was developed to prevent employers from evading obligations under the Act by merely changing or altering their corporate form. If we were to require a finding of employer intent, an employer who desired to avoid union obligations might be tempted to circumvent the doctrine by altering the corporation's structure based on some legitimate business reason, retaining essentially the same business, and utilizing the change to escape the unwanted obligations. Our flexible approach will discourage such attempts at circumvention by allowing the Board to weigh all the relevant factors instead of requiring it to always show the employer's intent to evade. Accordingly, even when purportedly legitimate reasons support an alteration in structure, the Board can prevent an employer from avoiding obligations under the Act.

These observations have special force in the instant case. Here, petitioners not only have proved Nor-Cal and North Bay to be a single employer, but also have introduced persuasive, undisputed, unimpeached evidence showing respondents' anti-union animus *and* their intent to avoid Nor-Cal's collective bargaining obligations. Nevertheless, the court of appeals' decision requires a trial of respondents' pretextual "alternative explanation" for the existence of North Bay.

Such a result conflicts not only with the policies and purposes of the Act, but also with the strong majority of the circuits and the Ninth Circuit's own prior holdings in *O'Neill, supra,* 965 F.2d at 1529 and *Haley & Haley, supra,* 880 F.2d at 1150. These conflicts plainly warrant resolution.

There is a special circumstance, however, which the Court may find to justify a delay in its resolution of the

circuit conflict presented by this petition and the one in *Hospital San Rafael*, No. 94-1802. Despite approving the NLRB's objective alter ego standard, the Third Circuit in *Stardyne, supra*, did not enforce the Board's order but remanded the case to the Board for further proceedings. The basis for the remand was that the Third Circuit perceived a conflict within the Board's cases on the issue of whether or not single employer status is a prerequisite to alter ego status. *Stardyne, supra*, 41 F.3d at 152-153.

The Board's resolution of *Stardyne*, and its explanation of the relationship between single employer and alter ego status, may prove essential to this Court's review of the criteria for determining alter ego status. Without the Board's clarification of how its objective criteria are to be used in determining alter ego status, it may be difficult to evaluate the subjective intent requirement. Accordingly, this Court's resolution of the circuit conflict should await the Board's decision in *Stardyne*. Indeed, the Board's decision may render this Court's intervention unnecessary.

Nevertheless, the decision below stands in conflict with the holdings of the NLRB, eight circuit courts of appeals, the Ninth Circuit's own prior decisions, and the sound reasoning of *Stardyne, supra*, and *Allcoast Transfer, supra*. To alleviate these conflicts while the Board considers *Stardyne*, the Court should grant this petition, summarily vacate the decision below, and remand the case for further proceedings. This will allow the Ninth Circuit to resolve its inter- and intra-circuit conflicts with the assistance of the Board's decision in *Stardyne*.

CONCLUSION

The circuits' division on the alter ego intent issue is one which should be resolved. However, that resolution should come after the NLRB has carried out its "primary responsibility for developing and applying national labor

policy." *N.L.R.B. v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-787 (1990).

Accordingly, petitioners respectfully submit that the court of appeals' decision below should be vacated summarily and this case should be remanded for appropriate further proceedings. Petitioners further submit that the petition in No. 94-1802 should be denied. However, should the petition in No. 94-1802 be granted, petitioners request that the instant petition also should be granted, or at least should be held pending disposition of that case.

Respectfully submitted,

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Dated: June 23, 1995

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-15749

UA LOCAL 343 OF THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; UA LOCAL NOS. 159, 342, 343, AND 444 COMBINED PENSION TRUST FUND; UA LOCAL NOS. 159, 342, 343 AND 444 COMBINED HEALTH & WELFARE TRUST FUND; AND UA LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,

Plaintiffs-Appellees,

v.

NOR-CAL PLUMBING, INC.; ELMAR LEE PETTIT; NORTH BAY PLUMBING, INC.; AUDREY JEAN PETTIT,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted Dec. 16, 1992

Decided Oct. 14, 1994

As Amended Feb. 28, 1995

Before: NORRIS, BEEZER, and KLEINFELD, Circuit Judges.

WILLIAM A. NORRIS, Circuit Judge:

Appellant Elmar Lee Pettit is a plumbing contractor who, with appellant Audrey Pettit, his wife, owns both Nor-Cal Plumbing, Inc. and North Bay Plumbing, Inc. Nor-Cal is union, and North Bay is non-union. Appellees, Local 343 and the employee trust funds in which it participates, brought this action under Section 301 of the Labor Management Relations Act ("LMRA") and Section 502 of the Employee Retirement Income Security Act ("ERISA"), seeking damages for breach of the Nor-Cal collective bargaining agreement. The action is premised on the theory that the collective bargaining agreement between Local 343 and Nor-Cal covered North Bay as well because North Bay was the alter ego of Nor-Cal.

On the basis of "an undisputed record of fraud, deception and obstruction," the district court ruled on summary judgment that North Bay was the alter ego of Nor-Cal. Order Granting Summary Judgment at 10 (quoting Order of May 24, 1988). Consequently, the court held that appellants breached the collective bargaining agreement by failing to extend its terms and conditions of employment to North Bay employees. The district court awarded appellees $2.5 million in fringe benefit contributions, liquidated damages, interest, attorneys' fees and costs, and $2 million in punitive damages. Judgment was entered not only against Nor-Cal on the theory that North Bay was its alter ego, but also against the Pettits in their individual capacities on the theory that appellants were entitled to pierce the corporate veil. On appeal, the defendants-appellants argue that the district court erred in granting summary judgment against Nor-Cal on the alter-ego theory, in failing to find the action time barred, in piercing the corporate veil to impose liability on the Pettits personally, and in awarding punitive damages. We uphold the court's ruling that the statute of limitations does not bar this action, but reverse summary judgment against Nor-Cal under the alter-ego theory and against the Pettits

under the veil piercing doctrine. Because we reverse summary judgment, we vacate the award for punitive damages.

I. PRIMARY JURISDICTION

As a preliminary matter, appellants argue that the doctrine of primary jurisdiction barred the district court from extending the Nor-Cal collective bargaining agreement to North Bay unless and until the National Labor Relations Board first determined that the employees of both firms constituted an appropriate bargaining unit. *See Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81, 82-83 (9th Cir.1982), *cert. denied*, 469 U.S. 887, 105 S.Ct. 263, 83 L.Ed.2d 199 (1984). This argument misunderstands the differences between the two theories with which an illegal "double breasted" operation can be challenged.

Appellants are correct that it may be perfectly legal for a contractor to conduct business through a "double-breasted" operation, one in which the same contractor owns both union and non-union companies for legitimate business purposes.[1] In such cases, the collective bargaining agreement of the union firm does not ordinarily apply to the non-union firm. Out of concern, however, that some contractors would use double-breasted operations to avoid their collective bargaining obligations, the courts and the NLRB have developed two conceptually related, but distinct theories—"single employer" and "alter ego"—to guard against such abuse. *Carpenters Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1275-77 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015, 105 S.Ct. 2018, 85 L.Ed.2d 300 (1985).

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[1] As we said in *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271 (9th Cir.1984), *cert. denied*, 471 U.S. 1015, 105 S.Ct. 2018. 85 L.Ed.2d 300 (1985), "[t]he non-union company can bid competitively on jobs that do not require union contractors, while the union company continues to bid on jobs requiring union contractors." *Id.* at 1275.

The requirements of these two theories overlap substantially. Under both theories, the district court must first determine whether the two firms are a single employer by measuring the degree of common ownership, management, operations, and labor relations. *See id.* at 1276. If this threshold requirement is met, the next step depends on which theory is pursued.

Under the "single employer" theory, the district court must defer to the NLRB, which has primary jurisdiction to determine whether the employees of both the union and non-union firms constitute an appropriate bargaining unit. Only if the NLRB finds that they constitute a single unit may the collective bargaining agreement with the union firm be extended to the non-union firm. *See South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 805-06, 96 S.Ct. 1842, 1844-45, 48 L.Ed2d 382 (1976) (per curiam); *Carpenters' Local Union No. 1478*, 743 F.2d at 1276-77 n. 7; *N.L.R.B. v. Don Burgess Constr. Corp.*, 596 F.2d 378, 386 (9th Cir.), *cert. denied*, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979). This is because the fact that NorCal and North Bay may constitute a single employer does not necessarily mean that their employees share a "community of interests" sufficient to make them a single bargaining unit. *See Don Burgess*, 596 F.2d at 386. This bargaining unit issue, which is a representational question, must be decided by the NLRB in the first instance. *See* 29 U.S.C. § 159(b) ("The Board shall decide in each case . . . [what] the unit appropriate for the purposes of collective bargaining shall be. . . ."); *Carpenters Local Union No. 1478*, 743 F.2d at 1278; *Cappa v. Wiseman*, 659 F.2d 957, 959 (9th Cir.1981).

Accordingly, if appellees had relied solely on the "single employer" theory, appellants would have prevailed on their primary jurisdiction argument. The district court could not have extended the collective bargaining agreement to North Bay without a prior determination by the

NLRB that the employees and North Bay and Nor-Cal constituted a single bargaining unit.

But appellees bypassed the "single employer" theory and instead invoked the "alter ego" theory. To prevail on the "alter ego" theory, appellees were required not only to make the threshold showing that the two firms were a single employer, but also to prove that North Bay was being used "in a sham effort to avoid collective bargaining obligations," *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333, 1336 (9th Cir. 1988), rather than for the pursuit of legitimate business objectives untainted by "union animus," *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147, 1150 (9th Cir.1989) (per curiam). *See also A. Dariano & Sons, Inc. v. District Council of Painters No. 33* 869 F.2d 514, 519 (9th Cir. 1989) ("In all alter ego determinations an element of fraud or misrepresentation also exists."). It is the settled law of our circuit that once appellees prevailed on these issues, the district court could hold that the Nor-Cal bargaining agreement covered North Bay without first getting a unit determination from the NLRB. *See, e.g., Northwest Adm'rs, Inc. v. Con Iverson Trucking, Inc.*, 749 F.2d 1338, 1340 (9th Cir.1984); *Carpenters' Local Union No. 1478*, 743 F.2d at 1276-77 ("[A] showing [that employees of both companies constitute a single bargaining unit] is not required under the alter ago doctrine.").[2]

Relying on *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 108

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[2] Appellants rely on *United Ass'n of Journeymen & Apprentices, Local 342 v. Valley Eng'rs*, 975 F.2d 611 (9th Cir.1992), to argue that the primary jurisdiction doctrine also applies in an "alter ego" case. In *Valley Engineers*, the NLRB made a determination that the two firms were neither a single employer nor alter egos. *See id.* at 613. The holding in *Valley Engineers* that the union could not collaterally attack this NLRB determination, *see id.* at 615, has no application to the case at bar because in this case, the NLRB has made no determination whatsoever.

S.Ct. 830, 98 L.Ed.2d 936 (1988), appellants also assert that ERISA does not provide the district court jurisdiction to enforce a collective bargaining agreement with North Bay employees who are not signatories to the NorCal labor agreement. *Advanced Lightweight Concrete* provides appellants no support, however, because the Court said ERISA provides no jurisdiction to enforce *noncontractual* obligations, specifically, an employer's obligation under the National Labor Relations Act to make pension fund contributions *post*-contract. *See id.* at 548-49, 108 S.Ct. at 835-36. Because the case at bar concerns *contractual* obligations, namely the employer's obligation to contribute during the agreement's term, jurisdiction under ERISA was also proper.

II. ALTER EGO

A. Standard of Review

On the merits, appellants claim that the grant of summary judgment on the "alter ego" theory was inappropriate. The alter ego test is, as they contend, highly fact specific. *See Local Joint Exec. Bd., Culinary Workers Union, Local 226 v. Royal Center, Inc.*, 796 F.2d 1159, 1164 (9th Cir.1986), *cert. denied*, 479 U.S. 1033, 107 S.Ct. 881, 93 L.Ed.2d 835 (1987); *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir.1982). Applying the standard test for summary judgment, we review the district court's decision *de novo* to decide whether a genuine issue of material fact exists. *See Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir.1986).

Because appellees had the burden of proof on the question of alter ego, they had the burden of establishing a prima facia case on their motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Once they did so, it became incumbent on appellants to "set forth specific

facts showing that there is a genuine issue for trial," Fed. R.Civ.P. 56(e), by evidence cognizable under that rule. Appellants' burden of contradicting appellees' evidence is not negligible. As the Supreme Court has explained, "[i]f the evidence is merely colorable or is not significantly probative summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (citation omitted).

B. Appellees' Burden

The record clearly demonstrates that appellees have borne their initial burden of establishing facts that, if left uncontroverted, would show that North Bay was the alter ego of Nor-Cal.

1. Single Employer

As explained above, the "alter ego" theory requires a threshold showing that Nor-Cal and North Bay constitute a single employer. The criteria for determining whether two firms constitute a single employer are (1) common ownership, (2) common management, (3) interrelation of operations, and (4) centralized control of labor relations. *See NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979). No one factor is controlling nor need all criteria be present. *See id.* The most important factor is centralized control of labor relations, which can be demonstrated either by showing common control of day-to-day labor matters, *see J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1034 (9th Cir.1982), or by showing that the person in charge of the union company's labor relations made the decision that the second company would be non-union, *see Don Burgess*, 596 F.2d at 385-86.

Appellees produced ample evidence that Nor-Cal and North Bay constitute a single employer. As for the first

two factors—common ownership and common management—appellees have introduced evidence showing that Elmar Lee Pettit owned both Nor-Cal and North Bay, and that he managed both businesses. In sworn testimony in the Solano County Municipal Court, Elmar Lee Pettit testified: "I own North Bay Plumbing. . . . I presently own three plumbing companies, including North Bay Plumbing." (S.E.R. Tab 8, at 3.) He has operated North Bay under three different contractor's licenses, two of which also name Audrey Pettit. But even those licenses listing Audrey Pettit as co-owner record Elmar Lee Pettit as the "Qualifying Partner or Responsible Managing Officer," which means that he certified, under penalty of perjury, that he would "exercise at all times during [his] employment such supervision and control of . . . construction operations as is necessary to secure full compliance with the provisions of Section 7068.1 [of the California Business and Professions Code]. . . ." (*See* S.E.R. Tab 55, at 13.) The licensing form that Elmar Lee Pettit signed explains that

> *supervision and control* includes any one or any combination of the following activities: supervising construction, running jobs, making installations, supervising employees, overseeing sub-contractors, checking jobs for proper workmanship, managing contracting activities or working full-time on jobs.

(*Id.*) Moreover, sworn declarations from several former employees and customers of North Bay state that Elmar Lee Pettit exercised this kind of control over North Bay's day-to-day operations (S.E.R. Tabs 13; 41-44; 50-53.)

As for the third factor—interrelation of operations between the two companies—appellees presented evidence to show that Nor-Cal's purchasing agent established North Bay's accounts on the strength of Nor-Cal's credit and served briefly as purchasing agent for both companies. (*See* S.E.R. Tab 16.) The two companies exchanged

materials and supplies and kept a running tab without charging each other for overhead or handling. (*See* S.E.R. Tab 14, at 4-5.) And as elaborated below, the two corporations and the Pettits commingled their finances. (*See* S.E.R. Tab 24, Exh. 21.)

Finally, as for the fourth and most important factor—centralized control of labor relations—three North Bay plumbers testified that Elmar Lee Pettit hired them, (*see* S.E.R. Tabs 41-43), and four testified that he supervised, trained, or fired them, (*see* S.E.R. Tabs 41-44). In addition to such day-to-day control over labor relations, Elmar Lee Pettit apparently made the decision that North Bay would be a non-union shop. According to affidavits submitted by appellees, Elmar Lee Pettit told associates that a non-union shop was the only way he could make any money. (*See* S.E.R. Tab 16, at 14-16; Tab 41, at ¶¶ 2, 10; Tab 42, at ¶ 6.)

2. Intent

To establish North Bay as the alter ego of Nor-Cal, appellees must not only make the threshold showing that the two firms constituted a single employer but also must show that North Bay was created in "an attempt to avoid the obligations of [Nor-Cal's] collective bargaining agreement through a sham transaction of a technical change in operations." *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 518 (9th Cir.1989). The appellees presented significant evidence of Elmar Lee Pettit's anti-union animus and his intent to avoid the collective bargaining agreement with Local 343. Evidence was presented to show that on numerous occasions he declared "I'm gonna close that fucking Union shop!" (S.E.R. Tab 42, at ¶ 6.) Further evidence was presented that he even told a customer that he had to take care to "conceal his involvement with North Bay so that he would not get caught at double breasting." (S.E.R. Tab 13, at ¶ 11.) The appellees also presented evidence that

Elmar Lee Pettit used North Bay to do work that would have been performed by Nor-Cal if North Bay had not been created. In fact, their evidence showed that several Nor-Cal projects were transferred to North Bay abruptly, in the middle of the job. (*See* S.E.R. Tab 13, at ¶¶ 8-11; Tab 14, at ¶¶ 40-43; Tab 52, at ¶ 3.) Finally, the appellees presented evidence that Nor-Cal stopped bidding on jobs and shut down its operations in 1987. (*See* S.E.R. Tab 29, at ¶¶ 8-12).

Appellants argue that this evidence is insufficient as a matter of law given that the two firms coexisted for a significant period of time. They argue that the "alter ego" theory is appropriate only in situations in which the union firm is closed and a new non-union firm is immediately opened in its place. Although the "alter ego" theory is commonly applied in successorship situations, it is not limited to this context. Indeed, some period of simultaneous operations is not uncommon even when the non-union firm is alleged to be the successor of the union firm. For example, in *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147 (9th Cir.1989) (per curiam), a union trucker continued in business for sixteen months after its non-union alter ego successor was established. *See id.* at 1148. In this case, the period of simultaneous operation was admittedly much longer. However, by itself, simultaneous operation does not preclude a finding of alter ego.

In sum, appellees have produced substantial evidence that North Bay and Nor-Cal constituted a single employer and that Elmer Lee Pettit's purpose in establishing North Bay was to effect a technical change in operations that would enable him to continue his plumbing business while avoiding his obligations under the collective bargaining agreement with the employees of Nor-Cal. Accordingly, we hold that appellees have borne their initial burden of providing evidence that, if uncontroverted, would entitle them to prevail on the "alter ego" theory.

C. Appellants' Burden

Once the appellees have made their initial showing, the burden shifts to the appellants to show that they presented specific facts that raise a genuine issue of material fact for trial. While we hold that the appellants have failed to create a genuine issue of material fact as to whether North Bay and Nor-Cal constituted a single employer, we do hold that the appellants have produced evidence sufficient to raise such an issue with respect to Elmar Lee Pettit's intent to create and operate North Bay in an attempt to avoid the obligations of Nor-Cal's collective bargaining agreement.

1. Single Employer

Appellants argue that the marital relationship between Elmar Lee and Audrey Pettit should not create a presumption that North Bay and Nor-Cal are a single employer, which is true, but this argument ignores Elmar Lee Pettit's sworn statement that *he* owned and managed North Bay.

Appellants also argue that Dave Adams managed Nor-Cal with Elmar Lee Pettit, while North Bay had a series of managers who worked for Audrey Pettit. But the evidence they cite does not contradict appellees' evidence that Elmar Lee Pettit owned and controlled Nor-Cal and was at the same time the driving force behind North Bay. In particular, it does not contradict appellees' evidence that Elmar Lee Pettit hired, trained, and fired North Bay's employees, and that Elmar Lee Pettit made the decision that North Bay would be non-union. Nor does appellants' evidence contradict appellees' proffer that Elmar Lee Pettit transferred Nor-Cal accounts to North Bay.

Elmar Lee Pettit does declare that "I told [customers] I could not help them, that they should call North Bay Plumbing." (C.R. 229.) But these general denials of involvement in North Bay's affairs conflict with his sworn

statements on North Bay's business license that he would "supervis[e] and control" North Bay's plumbers. Such internal inconsistencies in a party's own testimony fail to create a *genuine* issue of material fact as to whether North Bay was the alter ego of Nor-Cal. *See Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975) (holding that "the necessity of choosing between the [appellants'] two conflicting versions" of a material fact does not defeat summary judgment).

2. Intent

Even though the district court correctly ruled that there was no triable issue as to whether North Bay and Nor-Cal were a single employer, we believe that the court erred in ruling that there was no material issue regarding Elmar Lee Pettit's intent. Pettit's testimony presents an alternate explanation of the reasons why North Bay was created and for the eventual demise of Nor-Cal. He states that North Bay was created at the suggestion of John Adams, who wanted to go into business with Audrey Pettit as a way of making ends meet during a strike of Nor-Cal employees. (*See* C.R. 115, at ¶ 2). Elmar Lee Pettit testified that Audrey Pettit thought starting the business was a good idea and that John Adams was the "driving power behind North Bay." (*Id.*). He further testified that North Bay concentrated on residential work, while Nor-Cal did more commercial projects. (*See id.* at ¶¶ 28-30).

While the fact that North Bay coexsited with Nor-Cal for a number of years does not preclude a finding of alter ego, the continued operation of Nor-Cal after the creation of North Bay is probative of Pettit's intent in creating North Bay. Had Pettit created North Bay with the intention of diverting all of Nor-Cal's business to his new, non-union shop, one would expect to find a relatively quick decrease in Nor-Cal's business accompanied by a corresponding increase in the business of North Bay. How-

ever, Pettit testified that Nor-Cal not only continued in operation for more than five years after the creation of North Bay, but that its workforce and gross earnings increased significantly over that time period. (*See id.* at ¶ 15). He stated that employment grew from about ten men to 25-30 men and gross income increased from $688,000 to over $2,500,000. (*See id*). This evidence is sufficient to raise a genuine issue of fact, precluding summary judgment.

Finally, Elmar Lee Pettit's testimony contradicts the appelles' suggestion that Nor-Cal's demise was the result of his intentional actions designed to close down the union shop in favor of North Bay. He testified that the dramatic decline in Nor-Cal's business in 1987 resulted from union organizers talking Nor-Cal employees into quitting their jobs in protest when Pettit refused to turn North Bay into a union shop. (*See id.* at ¶¶ 26-30).

Drawing the inferences most favorable to the nonmoving party, as we are required to do on summary judgment, we hold that the appellants' evidence creates a genuine issue of material fact regarding whether Pettit created and operated North Bay with the intention of avoiding Nor-Cal's collective bargaining obligations. Therefore, we reverse the district court's summary judgment against Nor-Cal.

III. STATUTE OF LIMITATIONS

Appellants also argue that the district court should have found the union's claims barred by the statute of limitations.[3] Actions brought under § 301 of the LMRA are governed by the relevant statute of limitations of the forum state, in this case, California's four-year period for

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[3] Appellants also argue laches, but laches is an equitable defense unavailable in actions at law governed by a statute of limitations. *See International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp.*, 518 F.2d 913, 925-26 (9th Cir.1975); *County of Alhambra*, 27 Cal. 3d 184, 165 Cal.Rptr. 440, 612 P.2d 24, 31 (1980).

breach of contract claims. *See* Cal.Civ.Proc.Code § 337 (West 1933); *Waggoner v. Dallaire*, 649 F.2d 1362, 1367 (9th Cir.1981). The limitations period may be tolled, however, if appellants mislead the appellees. *See Waggoner*, 649 F.2d at 1368.

We agree with the district court that the doctrine of equitable tolling applies here. As early as December 1980, Local 343 officers suspected Elmar Lee Pettit of illegal double-breasting, but when they confronted him with their suspicions, he denied owning North Bay and explained that it was his wife's business. (*See* C.R. 58, Exh. C.) The union nevertheless lodged an unfair labor practice charge with the NLRB, and withdrew the charge only when the Board stated that it lacked sufficient evidence to support a complaint and would dismiss the charge if it were not withdrawn. (*See* S.E.R. Tab 1, at ¶¶ 5-7.) The NLRB's determination that it lacked sufficient evidence rested, in turn, on two sworn statements from Elmar Lee Pettit, in which he denied having any ownership interest in North Bay or having substantial knowledge of its operations or its interrelationship with Nor-Cal. (*See* S.E.R. Tabs 6 & 7.) Appellants offered no evidence to establish a genuine issue of fact as to whether these statements fraudulently concealed the facts from appellees.

Appellants contend that, once on notice of a potential claim, the appellees had an obligation to make a reasonable effort to investigate the facts. Specifically, they fault appellees for not enforcing an information request under their collective bargaining agreement. We reject this argument because the record shows that appellees went several times to Elmar Lee Pettit for information, both directly and through the NLRB, and were met with misleading assurances that he had nothing to do with North Bay. Where a plaintiff suspects the truth but investigates unsuccessfully, fraudulent concealment will toll the statute. *See Sears, Roebuck & Co. v. Blade*, 139 Cal.App.2d

580, 294 P.2d 140, 146-47 (1956). Accordingly, the statute of limitations does not bar this action.

IV. PIERCING THE CORPORATE VEIL

We now consider the district court's ruling that there was no genuine issue of fact material to whether the union was entitled to pierce the corporate veil of Nor-Cal and impose personal liability upon the Pettits. In deciding whether to pierce the corporate veil, we consider three factors: "[1] the amount of respect given to the separate identity of the corporation by its shareholders, [2] the degree of injustice visited on the litigants by recognition of the corporate entity, and [3] the fraudulent intent of the incorporators." *Seymour v. Hull & Moreland Eng'g*, 605 F.2d 1105, 1111 (9th Cir.1979). Appellees must prevail on the first threshold factor and on one of the other two. *See Board of Trustees v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 773 (9th Cir.1989). In this case, the district court concluded that there was no genuine issue of fact as to any of the three factors and pierced the veil. We reverse the summary judgment on the veil-piercing claim because at a minimum, there are disputed fact issues regarding both the fraud and justice factors.

First, we conclude that the district court erred in holding that it was undisputed that "[t]he evidence establishes that North Bay was formed for the purpose of defrauding the union and the trust funds." Order Granting Summary Judgment at 10. In the context of the alter ego determination, we have held that there remains a genuine issue of fact as to whether Elmar Lee Pettit intended to evade the obligations of the collective bargaining agreement.[4]

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[4] Appellees also argue that the Pettits should be held personally liable as participating tortfeasors and for fraudulent misrepresentation under § 301 of the LMRA. These arguments were not addressed by the district court. However, both theories depend upon proving that the Pettits undertook to fraudulently evade

The fraudulent intent element of the vail-piercing doctrine would not be satisfied, however, merely by appellees' establishment of an entitlement to summary judgment against Nor-Cal and North Bay under the alter ego doctrine. The doctrines are analytically distinct and require different factual inquiries.

The alter ego doctrine as developed in labor law is analytically different from the traditional veil-piercing doctrine as developed in corporate law. The alter ego doctrine is designed to prevent employers from escaping their collective bargaining obligations by shifting work to non-union firms they also own. This doctrine has nothing to do with the doctrine that allows creditors of corporations to pierce the corporate shell to hold shareholders liable for corporate debts if they abuse the corporate form to defraud creditors.[5]

When unions invoke the alter ego doctrine to enforce collective bargaining obligations on behalf of their members, it is irrelevant whether or not the employers are corporations. The doctrine may be invoked regardless whether employers are corporations, partnerships, or wholly owned proprietorships. In this case, for example, appellees could have invoked the alter ego doctrine even if the Pettits were conducting their plumbing businesses as sole proprietorships rather than as corporations, and even if Nor-Cal and North Bay were financially healthy corporations.

The veil-piercing doctrine does not come into play in this case unless and until appellees establish their right to a money judgment against Nor-Cal and North Bay under

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their collective bargaining obligations. Since there remains a dispute regarding Elmar Lee Pettit's intent, summary judgment on these alternative grounds is also inappropriate.

[5] *See Valley Cabinet*, 877 F.2d at 773 ("Garden variety fraud should be insufficient to pierce the corporate veil in the absence of evidence of shareholder abuse of the corporate form to defraud creditors.").

the alter ego doctrine. As we said in *Seymour*, the traditional rules on piercing the corporate shell at most affect the quality of a labor organization's remedy if it finds itself with a judgment against an insolvent corporate shell. *See Seymour*, 605 F.2d at 1111.

Appellees argue, however, that other acts of undisputed fraud can support their veil piercing claim. First, they argue that the Pettits committed tax fraud by paying personal expenses out of the corporate accounts and underpaying income taxes. However, this characterization of the business records is in dispute. *See* Declaration of Sam Gallina, C.R. 119.

Second, Appellees argue that the Pettits' fraudulent concealment of the relationship between North Bay and NorCal satisfies the fraud factor. However, we have held that "[g]arden variety fraud should be insufficient to pierce the corporate veil in the absence of evidence of shareholder abuse of the corporate form to defraud creditors." *Valley Cabinet*, 877 F.2d at 773. Thus, it is not enough that the Pettits committed acts of fraud during the operation of their businesses. Instead, the plaintiffs must show that the "shareholder misused the corporate form to perpetrate the[] fraud." *Id.* Whether the Pettits misused the corporate form to fraudulently evade the obligations of the collective bargaining agreement is in dispute. However, false statements *about* the relationship between the Pettits' corporations do not, in themselves, constitute misuse *of* the corporate form to perpetrate a fraud.

Thus, summary judgment on the veil-piercing issue cannot be supported under a fraud theory.[6]

However, appellees' argue that the *injustice* factor of the veil-piercing inquiry has been satisfied. They contend that not piercing the corporate veil would allow the Pettits to retain the financial rewards of their fraudulent scheme.

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[6] We have reviewed Appellees' other claims of fraud and find them to be meritless.

But this presumes the truth of what is in genuine dispute —that the Pettits misused the corporate form to drain corporate assets. Appellees also claim that it would be unjust not to pierce the veil because they would not be able to recover damages otherwise. But our precedents do not recognize that the "inability to collect . . . by itself, constitute[s] an inequitable result." *Seymour*, 605 F.2d at 1113.

Viewed in a light most favorable to the Pettits, the evidence raises genuine issues of fact on both the fraud and injustice factors of the traditional veil-piercing inquiry. Accordingly, the Pettits cannot be held personally liable for the obligations of their corporations at summary judgment.

V. PUNITIVE DAMAGES

Because we reverse the summary judgments entered against all defendants, we necessarily vacate the award of punitive damages. We therefore do not reach the issues raised by appellants regarding availability of punitive damages as a matter of law.

CONCLUSION

The summary judgment against all defendants is VACATED. The cause is REMANDED for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

No. C 87-2365 BAC

U.A. LOCAL NO. 343 OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, U.A. LOCAL NOS. 159, 342, 343 AND 444 COMBINED PENSION TRUST FUND, U.A. LOCAL NOS. 159, 342, 343 AND 444 COMBINED HEALTH & WELFARE TRUST FUND, AND U.A. LOCAL NO. 343 JOURNEY MAN AND APPRENTICE TRAINING TRUST FUND,

Plaintiff,

v.

NOR-CAL PLUMBING, INC., NORTH BAY PLUMBING, INC., ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT, AND AUDREY JEAN PETTIT,

Defendants.

April 22, 1992

ORDER GRANTING SUMMARY JUDGMENT

CAULFIELD, District Judge.

This matter comes before the court on defendants' motion for partial summary judgment and plaintiffs' cross-motion for partial summary judgment. Oral argument was heard on January 17, 1992. After careful consideration of the parties' written and oral arguments, documents submitted in support, and the record as a whole, the court

finds it appropriate to DENY defendants' motion and GRANT plaintiffs' motion.

BACKGROUND

Plaintiffs are U.A. Local No. 343, a plumbers and pipefitters union, and the labor-management trust funds in which it participates. Defendant Nor-Cal Plumbing, Inc. ("Nor-Cal"), has been a party signatory to successive collective bargaining agreements with plaintiff U.A. Local 343 since at least 1965.[1] The complaint alleges that defendants transferred the business of Nor-Cal, owned by defendant Elmar Lee Pettit, to defendant North Bay Plumbing, Inc. ("North Bay"), which was established in 1980. North Bay is a non-union company allegedly owned by Mr. Pettit's wife, defendant Audrey Jean Pettit, but which plaintiffs contend was in fact owned, controlled and managed by Mr. Pettit. It is alleged that North Bay continued Nor-Cal's business, but has not honored U.A. Local 343's Labor Agreement (the "Agreement").

In Count II, plaintiff trust funds seek an audit in order to recover the pension, health and welfare and other fringe benefit contributions they should have received had defendants applied the Agreement to North Bay. Plaintiffs have obtained the audit through discovery, and seek judgment in the amount of $2,551,244.28 delineated as follows: 1) fringe benefit contributions—$1,066,820.07; 2) liquidated damages—106,682.09; 3) interest—$899,066.00; 4) attorneys fees and litigation—$478,736.12. Their claims are made under Section 301

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[1] On or about June 30, 1983, Nor-Cal executed a two-year Memorandum of Understanding modifying the then-existing Master Labor Agreement by and between the Plumbing, Heating and Cooling Contractors Association of Napa, Solano and Lake Counties and plaintiff U.A. Local 343. On or about May 7, 1984 defendant Nor-Cal executed the Residential Plumbing Addendum to the Master Labor Agreement, extending the agreement to at least June 30, 1987.

of the LMRA for breach of the Agreement and under Sections 502 and 515 of ERISA for failure to make the required contributions.

In Count III, plaintiffs claim that defendants fraudulently concealed the true nature and extent of their business through affirmative acts of deception as well as failures to disclose material information.

Count IV is a claim by plaintiff trust funds for punitive damages in an amount equal to compensatory damages based upon the alleged willful and malicious behavior of defendants. Plaintiffs seek an order granting summary judgment against all four defendants on Counts II, III and IV of the Complaint.[2]

STATUTE OF LIMITATIONS AND/OR LACHES

Defendants again attempt to raise a state of limitations or laches defense in this action. However, plaintiff's claims have already been held not to be time-barred. As Judge Schwarzer stated in his order dated May 24, 1988,

> This undisputed record of fraud, deception and obstruction suffices to estop these defendants from asserting the statute of limitations after January, 1981.

New facts have not been brought to light, but rather defendants seek to reargue points previously raised and rejected. The court will not entertain such arguments.

SUMMARY JUDGMENT

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where the movant shows that there is no geninue issue as to any material fact and that the party is entitled to a judgment as a matter of law. In making this determination, the Court

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[2] The Union's claims in Count I for wages and dues were dismissed without prejudice for pursuit under the Agreement's grievance procedure.

must draw inferences in the light most favorable to the non-moving party, and the burden is on the movant to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Once the moving party has met this burden, the non-moving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. Thus, the non-moving party "must do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

NOR-CAL AND NORTH BAY ALTER EGO TEST

This case arises out of the alleged double-breasting of defendants. A double-breasted employer relationship is where a union-signatory business or its owners also have an interest in another similar non-union business. Although double-breasting is not *per se* unlawful, if the non-union business is found to be the "alter ego" of the union business, they will be held to have violated the labor agreement.

Plaintiffs allege that North Bay is the alter ego of Nor-Cal. Plaintiffs must first establish that the businesses are a single employer. After such an initial single-employer finding, the court determines whether the non-union business is in reality either the disguised continuance of a former union signatory or an attempt to avoid the obligations of the union signatory's collective bargaining agreement through a sham transaction or a technical change in operation. *Haley & Haley, Inc. v. NLRB*, 880 F.2d 1147, 1149-50 (9th Cir.1989); *Northwest Admrs., Inc. v. Con Iverson Trucking, Inc.*, 749 F.2d 1338, 1340 (9th Cir.1984).

If the two businesses are found to be only a single employer, the N.L.R.B. must determine whether their employees together constitute an appropriate bargaining unit, and thus whether the double-breasted employer can be held liable under the labor agreement. *International Woodworkers of America v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir.1980). If the alter ego relationship is established, however, the Court may proceed directly to enforcement of the collective bargaining agreement. *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, 518 (9th Cir.1989). Damages recoverable by trust funds in alter ego cases under ERISA consist of unpaid fringe benefit contributions plus liquidated damages, interest and attorneys' fees. 29 U.S.C. §§ 1132(g)(2), 1145.

The criteria for determining single employer status are 1) interrelation of operations, 2) common management, 3) centralized control of labor relations, and 4) common ownership. *NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378, 384 (9th Cir.1979), *cert. denied*, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979). No one factor is controlling nor need all criteria be present. *Id.* "Single employer status ultimately depends on 'all the circumstances of the case' and is characterized as an absence of an 'arm's length relationship found among unintegrated companies.'" *Id.* at 384 (citations omitted).

The most important factor is centralized control of labor relations. *J.M. Tanaka Constr., Inc. v. NLRB*, 675 F.2d 1029, 1034 (9th Cir.1982) (citing *Los Angeles Marine Hardware Co. v. NLRB*, 602 F.2d 1302, 1305 (9th Cir.1979)). Commonly controlled labor relations can be shown either on the basis of common control of day-to-day labor matters, *Tanaka*, 675 F.2d at 1034, or by showing that the person in charge of the union company's labor relations made the decision that the second company would be non-union. *Burgess*, 596 F.2d at 385-86. It is undisputed that Mr. Pettit controlled

Nor-Cal's labor relations. As for North Bay, sworn declarations and deposition testimony establish that Mr. Pettit handled the hiring, firing, promotions, demotions, training and supervising and thus controlled day-to-day labor matters. Moreover, extensive evidence establishes that Mr. Pettit concealed having established North Bay and made the decision that North Bay would be non-union.

Evidence of common control of labor relations also shows common management. In addition, the minutes of North Bay's original corporate directors' meeting show Mr. Pettit as North Bay's sole director, president and chairman.[3] Mr. Pettit was also the contractor's license qualifier and responsible managing officer for both Nor-Cal and North Bay. Under California law the qualifier is "responsible for exercising such direct supervision and control of [the contractor's] operations as is necessary to secure full compliance with the provisions of this chapter. . . ." Cal.Bus. & Prof.Code § 7068.1. The Ninth Circuit has found this to be a significant factor. *Burgess*, 596 F.2d at 385.

The evidence also indicates that Mr. Pettit had financial control of North Bay, and in fact from mid-1983 through 1986, signed over half of North Bay's checks. Finally, according to their sworn declarations, customers dealt with Mr. Pettit when they wanted bids or had problems.

Uncontroverted evidence shows that Nor-Cal and North Bay had closely interrelated operations. They shared equipment, material and supplies, coordinated and combined purchases, and made a number of "loans" without interest or promissory notes. Thus, Nor-Cal and North Bay were not operated at "arm's length," but rather should be treated as a single employer.

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[3] Another version of the same minutes shows Mrs. Pettit as the sole director, president, and chairman of North Bay.

Having established the threshold issue of single employer status, the court now addresses the alter ego issue. As explained by the Ninth Circuit in *Haley*, "the alter ego transfer is in essence a sham transaction, motivated by the employer's desire to avoid its contractual obligations." 880 F.2d at 1149 (citations omitted). There is substantial undisputed evidence that North Bay was set up in order to eliminate the high costs of dealing with the Union. Jack [D]outhit, North Bay's purchasing agent, has so testified. In addition, John Adams, the initial manager at North Bay, admitted that the purpose "was to transfer Nor-Cal's customers to North Bay, close down Nor-Cal Plumbing, and then have a non-union shop."

Defendants transferred Nor-Cal's major customers to North Bay, including the two largest, Lewis Homes and Presley Homes. Frank Hodel, who was supposedly in charge of North Bay, has testified that he was surprised by the transfer of the Presley Homes account, which took place when Mr. Pettit was on a fishing trip to Mexico with Garth Patterson, Presley's vice president. Kaufman and Broad's Bradbury Homes project was taken over by North Bay in the middle of the job, as testified by Cliff Russell. The person Mr. Russell dealt with for both Nor-Cal and North Bay was Mr. Pettit.

Defendants' assertion that Nor-Cal was unable to bid competitively is not supported by the evidence. Nor-Cal had been successful in obtaining bids, but Mr. Pettit and Nor-Cal Superintendent Dave Adams stopped bidding new work in December 1986. Dave Adams transferred to North Bay in January 1987.

The issue of whether an alter ego relationship exists is particularly fact-intensive, and frequently summary judgment is inappropriate. *See Sheet Metal Workers International Assoc. v. Arizona Mechanical & Stainless, Inc.* 863 F.2d 647, 652 n. 5 (9th Cir.1988). In this instance, however, plaintiffs' evidence, including defendants' admissions, documentary evidence, and the testi-

mony of disinterested percipient witnesses, is overwhelming. Defendant's are unable to contradict plaintiffs' evidence by reliable documentary or disinterested third-party evidence.

The only evidence supporting defendants' position are the denials by Mr. Pettit of ownership and management of North Bay. These statements are contradicted by numerous previous statements by Mr. Pettit that he did own and manage it, including those contained in North Bay's contractors' license applications made under penalty of perjury. The Ninth Circuit has stated,

> The very object of summary judgment is to separate real and genuine issues from those that are formal or pretended, so that only the former may subject the moving party to the burden of trial. Here we are convinced that the issues of fact created by [the non-moving party] are not issues which this Court could reasonably characterize as genuine; rather, they are sham issues which should not subject the defendants to the burden of a trial.

Radobenko v. Automated Equipment Corp., 520 F.2d 540, 543-44 (9th Cir.1975). Defendants' denials do not establish a genuine issue of material fact. Accordingly, summary judgment is GRANTED in favor of plaintiffs.

PERSONAL LIABILITY OF THE PETTITS

Ninth Circuit decisions have considered three factors in determining whether to pierce the corporate veil: 1) a unity of interest and ownership between the corporation and the shareholder such that the two no longer exist as separate entities; 2) failure to disregard the corporation would result in injustice; and 3) fraudulent intent of the incorporators to evade civil or criminal liability. *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1111 (9th Cir.1979). Although plaintiff need only establish injustice *or* fraudulent intent in addition to dis-

regard of the corporate identity, *Board of Trustees v. Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 773 (9th Cir.1989), all three factors are present here.

The evidence demonstrates that the Pettits did not respect the separate corporate identities of either Nor-Cal or North Bay. The Pettits regularly paid for personal expenses out of corporate funds, including grocery and hardware store bills, improvements on personally owned real estate, vehicles and repairs, life insurance, home utility bills, real estate tax and insurance on their property, and fees for preparing their wills. The Ninth Circuit has held that such commingling of assets is "among the more serious abuses of the corporate identity." *Valley Cabinet*, 877 F.2d at 773. In addition, defendants' records contain references to large loans to and from the Pettits. These loans demonstrate a disregard of the corporate identity, because no promissory notes were ever executed and there is no evidence that interest was paid. *Laborers Clean-up Contract Admin. Trust Fund v. Uriarte Clean-up Service, Inc.*, 736 F.2d 516, 524 (9th Cir.1984).

As for fraudulent intent, as Judge Schwarzer stated in his order of May 24, 1988, defendants' conduct with respect to North Bay presents "an undisputed record of fraud, deception and obstruction." The evidence establishes that North Bay was formed for the purpose of defrauding the union and the trust funds. Frank Hodel and Robert Dandor have testified that concealment of the two companies' relationship occurred on a daily basis. For example, Mr. Pettit frequently told North Bay plumbers that "you didn't see me here," and stated to Lewis Homes Superintendent Donald Burton that he had to be "careful to conceal his involvement with North Bay so that he would not get caught at double-breasting." Defendants' fraudulently failed to report the work hours of their non-union plumbers. Post-incorporation use of the corporate form to perpetrate fraud satisfies the fraud-

ulent intent element, especially where employee protection is at issue. *Valley Cabinet*, 877 F.2d at 773-74.

Moreover, it would be unjust to recognize the corporate entities, which would allow the Pettits to retain the financial rewards of their fraudulent scheme and would prevent plaintiffs' recovery.[4] The doctrine of piercing the corporate veil "is designed to prevent a person from doing injury and then escaping responsibility by hiding behind a corporate shield." *Plumbers & Fitters v. Matt J. Zaich Constr. Co.*, 418 F.2d 1054, 58 (9th Cir.1969).

Since the Pettits are personally liable under the corporate veil-piercing doctrine, the court does not reach the issue of whether the Pettits should be held personally liable as participating tortfeasors or under section 301 of the LMRA. 29 U.S.C. § 185.

PUNITIVE DAMAGES

The Ninth Circuit has held that an award of punitive damages under Section 502(g)(2)(E) of ERISA is warranted where the employers' refusal to make promised contributions was "willful, wanton and malicious." *Winterrowd v. David Freedman & Co.*, 724 F.2d 823, 826 (9th Cir.1984) (citations omitted); *see also Cox v. Eichler*, 765 F.Supp. 601 (N.D.Cal.1990); *Kuntz v. Reese*, 760 F.2d 926 (9th Cir.1985), *withdrawn and vacated on other grounds*, 785 F.2d 1410 (1986). "Once the factual predicate for aggravated conduct is established the imposition of punitive damages is discretionary with the trier of fact." *Winterrowd*, 724 F.2d at 826. Plaintiffs have established that defendants' refusal to make contributions were not only willful, wanton and malicious, but also fraudulent. The court finds that a punitive damages award in the $2,000,000.00, approximately equal to plaintiffs' compensatory damages, is appropriate.

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[4] According to the analysis of Michael Keiser, as of 1988, the combined assets of Nor-Cal and North Bay were approximately $127,000, whereas plaintiffs' claims total over $2,000,000.

ATTORNEYS' FEE AND COSTS

As prevailing parties, the plaintiffs are entitled to a mandatory award of attorneys' fees to the plaintiff trust funds under section 502(g)(2)(D) of ERISA. 29 U.S.C. § 1132(g)(2)(D).[5]

CONCLUSION

For the forgoing reasons, summary judgment its hereby granted in favor of plaintiff Trust Funds and against all defendants as to Counts II, III and IV. Defendants' motion for partial summary judgment is denied in its entirety. Defendants are directed to pay damages to plaintiff Trust Funds in the amount of $2,551,244.28 for fringe benefit contributions, liquidated damages, interest, and attorneys' fees and litigation expenses, plus an additional $2,000,000 in punitive damages.

IT IS SO ORDERED.

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[5] Section 502(g)(2)(D) provides:

> (1) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendants.

[Filed Feb. 23, 1995]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-15749

D.C. No. CV-87-02365-BAC

UA LOCAL 343 OF THE UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO; UA LOCAL NOS. 159, 342, 343, AND 444 COMBINED PENSION TRUST FUND; UA LOCAL NOS. 159, 342, 343 AND 444 COMBINED HEALTH & WELFARE TRUST FUND; AND UA LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,
Plaintiffs-Appellees,

v.

NOR-CAL PLUMBING, INC.; ELMAR LEE PETTIT; NORTH BAY PLUMBING, INC.; AUDREY JEAN PETTIT,
Defendants-Appellants.

ORDER

Before: NORRIS, BEEZER, and KLEINFELD, Circuit Judges.

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Beezer and Kleinfeld have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

(2)

Supreme Court, U.S.
FILED
JUL 21 1995
CLERK

No. 94-2102

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

U.A. LOCAL NO. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED PENSION TRUST FUND; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED HEALTH & WELFARE TRUST FUND; and U.A. LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,

Petitioners,

v.

NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC.; ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; and AUDREY JEAN PETTIT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

Whether objective evidence of lawful intent in formation and operation of construction companies during a period of simultaneous operation may be considered as a factor in assessing whether the grant of summary judgment on an alter ego violation is proper?

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No. 94-2102

IN THE
SUPREME COURT OF THE UNITED STATES

U.A. LOCAL NO. 343 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO; U.A. LOCAL NOS. 159, 342, 343 and 444 COMBINED PENSION TRUST FUND; U.A. LOCAL NOS. 159, 342, 343 AND 444 COMBINED HEALTH & WELFARE TRUST FUND; and U.A. LOCAL NO. 343 JOURNEYMAN AND APPRENTICE TRAINING TRUST FUND,

Petitioners,

v.

NOR-CAL PLUMBING, INC.; NORTH BAY PLUMBING, INC.; ELMAR LEE PETTIT, a.k.a. ELMER LEE PETTIT; and AUDREY JEAN PETTIT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Nor-Cal Plumbing, Inc.; North Bay Plumbing, Inc.; Elmar Lee Pettit, A.K.A. Elmer Lee Pettit; and Audrey Jean Pettit, respectfully request that this Court deny the Petition for Certiorari which seeks review of the

decision of the Ninth Circuit reported below at 48 F.3d 1465 and reproduced in the Petition for Certiorari at Appendix A.

JURISDICTION

Respondents concur with Petitioners' statement of jurisdiction.

STATUTORY PROVISIONS INVOLVED

Respondents concur with Petitioners' statement of statutory provisions involved.

STATEMENT OF THE CASE

A. Nature of the Case

Nor-Cal Plumbing was a union contractor. North Bay Plumbing was not. After a summary judgment motion the trial court concluded that Nor-Cal and North Bay were not separate employers and that North Bay was in fact the alter ego of Nor-Cal. The District Court awarded damages and punitive damages to Plaintiffs and found husband and wife Elmer (Lee) and Audrey Pettit personally liable. The Ninth Circuit left the finding of single employer undisturbed, but determined that the finding of alter ego failed to properly assess substantial disputed facts inconsistent with an alter ego judgment including, inter alia, the fact that the plumbing companies operated side by side for over half a decade during which time the union business prospered, enjoying a nearly 300% increase in revenues. The Court of Appeal further concluded that the bulk of Pettitioners' evidence on issues of fraud was irrelevant or unpersuasive, suggested that the issue of personal liability was probably wrongly decided even if there was an alter ego finding and did not decide whether

punitive damages could be properly awarded in an ERISA collection action.

REASONS FOR DENYING THE PETITION

The decision of the Ninth Circuit in this case stands for the unremarkable proposition that when, in weighing the variety of factors that taken together constitute the test for alter ego status, the fact that the two businesses operated side by side, successfully, with the union business increasing its business substantially suggests that the businesses were lawfully formed and operated. Not only did the union business not cease operations until years later when, after contract negotiations failed, union officials convinced Nor-Cal plumbers to quit, but its employment grew from ten men to 25-30 men and its gross income increased from $688,000 to over $2,500,000 during the years for which damages are sought. As the Ninth Circuit noted: "Had Pettit created North Bay with the intention of diverting all of Nor-Cal's business to his new non-union shop one would expect to find a relatively quick decrease in No-Cal's business accompanied by a corresponding increase in the business of North Bay." 48 F.3d 1465, 1474 (9th Cir. 1995) (Petition at p. 12a).

Neither the National Labor Relations Board or any Circuit Court of Appeal holds that intent in formation or operation may not be weighed as a factor, even a controlling factor, in a particular case, in a finding of alter ego liability. [1] In this context, as we shall explain in more detail below, Petitioners' suggestion that there is a conflict amongst the Circuits and with the Board misrepresents the cited case law.

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[1] In addition, the cited cases concern appellate review of a Board determination, the bases for which are different than those applicable in the instant case. See P. 4, et seq. , infra.

A. Stardyne, Inc. v. N.L.R.B., 41 F.3d 141 (3rd Cir. 1994)

Stardyne is legally and factually irrelevant. *Stardyne* involved a complete cessation of union operations by a manufacturer in the laser metal working aspects of its operations, with immediate resumption, with the same employees and management, as a non-union company. The legal finding of successor status was unchallenged on appeal and allegations of unlawful intent were not a factor in the Board's alter ego determination. However, neither the Board nor the court excluded intent as a meritorious issue - the legal controversy concerned, in part, whether intent was a necessary element of an alter ego determination. The latter controversy is not presented in our case.

The secondary "single employer" controversy presented by *Stardyne* on remand is also unrelated to the case at bar. Petitioners did not pursue a "single employer" theory of liability in the case below. If they had, the lack of a Board unit determination would have barred liability. *Nor-Cal* 48 F.3d 1470, Appendix at pp. 4a-5a.

***B. N.L.R.B v. Hospital San Rafael*, 42 F.3d 45 (1st Cir. 1994)**

Hospital San Rafael is irrelevant because the court based its decision, in a situation where there was no simultaneous operation, on the disguised continuance aspect of the alter ego test. In this limited context, which *Nor-Cal* case does not present, the "important' factor of motive was factually irrelevant. *Id*, 42 F.3d at 51. In *San Rafael*, the new hospital opened for operation 4 days after the old one closed and the old one surrendered its license to the new one. In *Nor-Cal*, the union business substantially increased its

employee complement, operations and revenues during more than one half decade of simultaneous operation.

In addition to the foregoing, *Hospital San Rafael* arose in the context of review of a board order, where the standards are very different from that of a summary judgment. As the *San Rafael* court noted - the "Board is entitled to a reasonable latitude in applying its own doctrine. See generally *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 18 L.R.R.M. 439 (1941). Whether the alter ego doctrine can be stretched much beyond the presents facts may be open to debate, but this case is within reasonable "limits." *Hospital San Rafael*, 42 F.3d at 52.

C. *N.L.R.B. v. Allcoast Transfer*, 780 F.2d 576 (6th Cir. 1986),

In *Allcoast Transfer*, the parent signatory company simply reconfigured a portion of its business because it had become a franchise of Atlas Moving. Under these circumstances, with little practical change in management or employees, a finding of continued application of the collective bargained agreement under a disguised continuance or sham transaction theory is also unremarkable.

Allcoast, *Stardyne* and *San Rafael Hospital* all properly stand for the principle that, in an alter ego determination, the court must take a flexible approach in making an overall assessment of alter ego status. Citing *J.M. Tanaka Construction, Inc. v. NLRB*, 675 F.2d 1029, 1033, 110 L.R.R.M 2296 (9th Cir. 1982); *Allcoast*, 780 F.2d at 581-582. The proposition advanced by Petitioners, that the Ninth Circuit held that unlawful intent is a necessary element in every alter ego case is <u>not</u> presented by the opinion below.

D. Prior Decisions of the Ninth Circuit, including *Haley & Haley, Inc. v. N.L.R.B.*, 880 F.2d 1147 (9th Cir. 1989

As we noted in our reply brief to the Ninth Circuit, the final straw man in Pettitioners' arsenal is their emphasis on *Haley & Haley, Inc. v. N.L.R.B.*, 880 F.2d 1147 (9th Cir. 1989), and their statement, which is not accurate, that the Ninth Circuit panel in *Nor-Cal* in any fashion suggested some novel re-working or departure from accepted alter ego analysis. In *Haley*, the employer's unlawful intent was a critical part of the finding of liability - the employer there transferred all the assets of one business to the other, fired all the workers, then required them to withdraw from the union in order to work for the second company *Id.*, 880 F.2d 1150. These are precisely the elements that are missing from the instant case and which are disputed, inter alia, by the independent evidence of the growth and prosperity of the union shop during the double breasted years.

CONCLUSION

In summation, Petitioners' submission in this case is a pencil without a point and should be summarily rejected. This case turns on evidence and that is why it has been remanded for trial. Judge William Schwarzer recognized this point when he denied Plaintiffs' First Petition To Attach:

> "[T]hese cases are very fact intensive. It is difficult to extrapolate from one to another, but this is essentially a case of sloppy management and carelessness about details. It is also a case of perceptions by others, because, obviously, Pettit had been -- Lee Pettit had been associated with this business for a long time, and it was very easy for people

> to assume that he would consider -- he would continue to be the guy that's running the job. But that doesn't -- that doesn't means that you can collect contributions on every job that North Bay did. You are going to have a lot more proof than that before I would let a verdict stand." (C.R. 151, p. 17 ll 12-22)

Respondents respectfully suggest the Court consider the suggestion of sanctions. After nearly a decade of litigation, and a clear and scholarly Ninth Circuit decision, the burden should no longer be on defendants to explain basic principles of alter ego doctrine to its opponent.

Respectfully submitted,

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